

FCC MAIL SECTION

Federal Communications Commission

FCC 99-261

OCT 5 3 00 PM '99

Before the  
Federal Communications Commission  
Washington, D.C. 20554

## DISPATCHED BY

|                             |   |                       |
|-----------------------------|---|-----------------------|
| In re Applications of       | ) | MM Docket No. 90-380  |
|                             | ) |                       |
| RIO GRANDE BROADCASTING     | ) | File No. BPH-880815MV |
|                             | ) |                       |
| ROBERTO PASSALACQUA         | ) | File No. BPH-880816NN |
|                             | ) |                       |
| IRENE RODRIGUEZ DIAZ        | ) | File No. BPH-880816OR |
| De McCOMAS                  | ) |                       |
|                             | ) |                       |
| UNITED BROADCASTERS COMPANY | ) | File No. BPH-880816OW |
|                             | ) |                       |

For Construction Permit For a New FM  
Station On Channel No. 247A  
at Rio Grande, Puerto Rico

## MEMORANDUM OPINION AND ORDER

Adopted: September 28, 1999

Released: October 1, 1999

By the Commission:

1. By this order we deny the petition for reconsideration filed June 24, 1999 by Rio Grande Broadcasting Company (RGB) and United Broadcasters Company (United).<sup>1</sup> Petitioners seek reconsideration of a Memorandum and Opinion and Order dismissing their proposed settlement agreement, which was contingent on the denial or dismissal of the competing applications of Roberto Passalacqua (Passalacqua) and Irene Rodriguez de McComas (McComas), who were not parties to the settlement agreement between RGB and United. *Rio Grande Broadcasting*, FCC 99-111 (rel. May 25, 1999). We find no basis to grant reconsideration.

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<sup>1</sup> The following pleadings are pending before the Commission: (a) petition for reconsideration, filed June 24, 1999 by Rio Grande Broadcasting Company and United Broadcasters Company; (b) opposition to petition for reconsideration, filed July 6, 1999 by Irene Rodriguez Diaz De McComas; and (c) opposition to petition for reconsideration, filed July 8, 1999 by the Mass Media Bureau.

## I. BACKGROUND

2. United, RGB, McComas, and Passalacqua are the remaining applicants in a comparative broadcast proceeding that was litigated through a decision by the former Review Board<sup>2</sup> before the Commission initiated the comparative freeze on February 25, 1994 pending resolution of the questions raised by *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993). As a result of the freeze, applications for review of the Board's decision granting United's application on comparative grounds, as well as McComas's motion to enlarge issues against RGB, were never considered by the Commission. The Commission subsequently adopted competitive bidding procedures to resolve pending comparative broadcast cases involving applications filed before July 1, 1997 pursuant to legislation expressly authorizing the use of auctions for these cases.<sup>3</sup> Under these procedures, which apply to cases in which universal settlements were not executed by February 1, 1998, all pending applicants are entitled to compete in the auction without the regard to non-final determinations as to their basic qualifications.

3. On November 9, 1998, two of the four remaining applicants, RGB and United, filed a settlement agreement with the Commission. The proposed settlement provided for the merger of United and RGB into a single applicant, NEWCO, the dismissal of RGB's application and the amendment of United's application to substitute NEWCO as the applicant. Approval of the agreement was conditioned upon the Commission's disqualifying or denying McComas's and Passalacqua's applications.

4. The Commission dismissed the proposed settlement agreement in this case, which was not executed until November 9, 1998, relying on its determination in the auction proceeding that, in the absence of a settlement agreement executed by February 1, 1998, all applicants not finally denied or dismissed by the Commission could participate in the auction. In concluding that an auction was required to resolve this adjudicatory proceeding and identifying both non-settling applicants (McComas and Passalacqua) as qualified bidders, the Commission noted its earlier refusal to extend the "significant yet not unlimited period" during which liberal settlement rules were to apply. Absent a showing that extending the statutorily-prescribed waiver period in this particular case would serve the public interest (which the Commission concluded was not made here), the Commission found that it would be inappropriate to waive auction procedures providing for an auction in which all pending applicants, including McComas and Passalacqua, could participate.

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<sup>2</sup> The Review Board granted United's application on comparative grounds and dismissed Passalacqua's application for lack of a viable transmitter site. *Rio Grande Broadcasting Co.*, 8 FCC Rcd 6256 (Rev. Bd. 1993), *recon. denied*, 8 FCC Rcd 8726 (Rev. Bd. 1993), *applications for review pending*. The Board previously reversed the ALJ's dismissal of McComas's application for being filed without an original signature. *Rio Grande Broadcasting Co.*, 6 FCC Rcd 5519 (Rev. Bd. 1991), *reversing*, FCC 91M-2432 (ALJ Aug. 6, 1991).

<sup>3</sup> *Implementation of Section 309(j) of the Communications Act -- Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Services Licensees* (MM 97-234) (First Report and Order), 13 FCC Rcd 15920, 15952-53 ¶¶ 89-90 (1998), *recon. denied*, Memorandum Opinion and Order, 14 FCC Rcd 8724, 8732-35 ¶¶ 16-18 (1999) (Hereafter *First Report and Order* and *Reconsideration Order*).

## II. PETITION FOR RECONSIDERATION

5. RGB and United seek reconsideration of the Commission's dismissal of their November 9, 1998 settlement agreement. They claim that the Commission did not articulate a rational basis for its distinction between contingent settlement agreements executed by February 1, 1998 and settlement agreements executed after that date. They urge that the February 1, 1998 date is not relevant because, although that date was prescribed by Congress as the end of a period for mandatory waivers of the Commission's regulations, a waiver is unnecessary to approve their proposed settlement. They assert, without citing a particular case, that there are other instances, presumably predating enactment of the 1997 Budget Act, in which the Commission has approved settlement agreements that were contingent on the Commission's disqualifying a non-settling applicant. RGB and United also rely on Sections 309(j)(1) and 309(j)(6)(E), which they read as permitting the use of a system of competitive bidding to award station authorizations only where there is more than one qualified applicant and mutual exclusivity is thus unavoidable. On this basis they likewise challenge the Commission's determination to consider only the winning bidder's qualifications after the auction. Given their reading of the statute, petitioners urge that, if basic qualifying issues are deferred until after the auction, the Commission must determine the basic qualifications of all auction participants. Absent a determination that there is more than one qualified applicant (*i.e.* that McComas and/or Passalacqua is qualified), the petitioners contend, an auction would be beyond the Commission's statutory authority and the merged applicant (NEWCO) would receive the station authorization without payment. McComas and the Mass Media Bureau oppose the petition for reconsideration.

## III. DISCUSSION

6. We will deny the petition for reconsideration filed by RGB and United. The petitioners have not demonstrated a material error or changed circumstances to support their request that the Commission reconsider its dismissal of a settlement agreement executed November 9, 1998 and thus beyond the 180-day period ending on February 1, 1998 during which the Commission was statutorily directed to facilitate settlements by waiving its regulations.

7. For cases that did not settle by February 1, 1998 the Commission adopted auction procedures providing for the post-auction consideration of basic qualifications questions concerning the winning bidder only. It did so, as the Bureau notes, after considering at great length what would best serve the public interest and ultimately deciding that post-auction resolution of qualifying issues would likely be more efficient and less costly for all the parties. Contrary to petitioners' claim and as explained by the Commission in the rulemaking,<sup>4</sup> these procedures contravene neither Section 309(j)(1) nor 309(j)(6)(E) of the statute, and are in fact

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<sup>4</sup> See *First Report and Order*, 13 FCC Rcd at 15953-54 ¶¶ 90-91; *Reconsideration Order*, 14 FCC Rcd at 8732-33, 8750-52 ¶¶ 16, 53-56, in which the Commission determined that: (1) Sections 309(j) and (l) are silent on whether basic qualifications must be determined before or after the auction; (2) the post-auction resolution of basic qualifications questions is consistent with Section 309(j)(5) expressly authorizing the prescription of expedited procedures to resolve substantial and material issues of fact concerning qualifications; and (3) the obligation to avoid mutual exclusivity under Section 309(j)(6)(C) does not require that the winning bidder be given a post-auction opportunity to establish that it is the only *qualified* applicant.

specifically authorized by Section 309(j)(5). There is therefore no statutory requirement that the Commission resolve outstanding qualifying issues as to a particular applicant before the auction, or that it afford the winning bidder a post-auction opportunity to dispute the basic qualifications of any unsuccessful bidders. Moreover, both petitioners participated in the rulemaking proceeding and RGB in particular sought reconsideration specifically objecting to the absence of a mechanism enabling a winning bidder to establish that it is the only basically qualified applicant. In this respect the petitioners rely on statutory arguments previously rejected by the Commission that were either raised or could have been raised in a timely filed petition for reconsideration in that proceeding. Thus, to the extent petitioners challenge, on statutory grounds, the auction procedures adopted in that rulemaking proceeding, it is well established that the Commission does not grant reconsideration for the purpose of debating matters on which it has already deliberated and spoken.<sup>5</sup> *WWIZ, Inc.*, 37 FCC 685 (1965), *aff'd sub. nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965).

8. Nor have petitioners demonstrated material error in the Commission's determination that its auction procedures warrant the dismissal of the RGB-United settlement agreement. An auction is unavoidable here, as the Commission properly concluded, because the applications of McComas and Passalacqua have not been finally dismissed or denied by the Commission and are mutually exclusive with those of the settling parties (United and RGB). Contrary to petitioners' assertion that the scope of Section 309(l)(3) is irrelevant,<sup>6</sup> approval of the proposed settlement would necessitate waiving the regulatory procedures requiring an auction under these circumstances and entitling McComas and Passalacqua to participate in that auction. Had the proposed settlement been executed within the 180-day settlement window prescribed by Congress, it would have been subject to Section 309(l)(3)'s waiver requirement.<sup>7</sup> Having reached their settlement long after the end of that period, however, United and RGB, are not entitled to the benefit of this limited provision.

9. Finally, petitioners' apparent reliance on the Commission's approval, prior to enactment of the 1997 Budget Act, of partial settlements contingent on adverse resolution of qualifying issues involving non-settling applicants is misplaced. Cases predating the institution of auction procedures, providing for the post-auction resolution of such issues and limiting such

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<sup>5</sup> See also *Motions for Declaratory Rulings Regarding Commission Rules and Policies For Frequency Coordination in the Private Land Mobile Radio Services*, FCC 99-160 ¶ 11 & n.48 (rel. Jul. 7, 1999) (denying March 1993 motions for declaratory ruling as untimely petitions for reconsideration of, and impermissible collateral attacks on, the Commission's Frequency Coordination decision, which became final in early 1987 after the agency ruled on petitions for reconsideration).

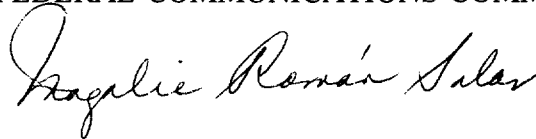
<sup>6</sup> Section 309(l)(3) mandates the waiver of Commission regulations to facilitate settlement agreements among pre-July 1st applicants "during the 180-day period" after enactment (that is, by February 1, 1998).

<sup>7</sup> See, e.g., *Heidi Damsky*, 13 FCC Rcd 11688 (1998), *recon denied*, 13 FCC Rcd 16352 (1998), *further recon. denied*, 14 FCC Rcd 370, 374-75 ¶¶ 11-12 (1999), *appeal pending*, *Heidi Damsky v. FCC*, Case No. 99-1018 (D.C. Cir. filed Jan. 13, 1999) (To require an auction where the Commission had disqualified an applicant pursuant to a settlement agreement executed by the only other applicants within the 180-day window Congress provided for applicants to voluntarily avoid an auction through settlement would deny the two settling applicants the relief Congress intended to provide).

resolution to the winning bidder, are clearly inapposite here. In contrast to pre-Budget Act settlements, petitioners' settlement agreement was executed after the end of the statutorily prescribed waiver period and after the adoption of regulatory procedures according all pending mutually exclusive applicants, including Passalacqua and McComas, the right to participate in an auction.

10. ACCORDINGLY, IT IS ORDERED, That the petition for reconsideration filed June 24, 1999 by Rio Grande Broadcasting Company and United Broadcasters Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in cursive script, reading "Magalie Roman Salas".

Magalie Roman Salas  
Secretary